(32)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No. 414.

UNION ELECTRIC COMPANY OF MISSOURI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY FOR PETITIONER

To Brief for the United States in Opposition.

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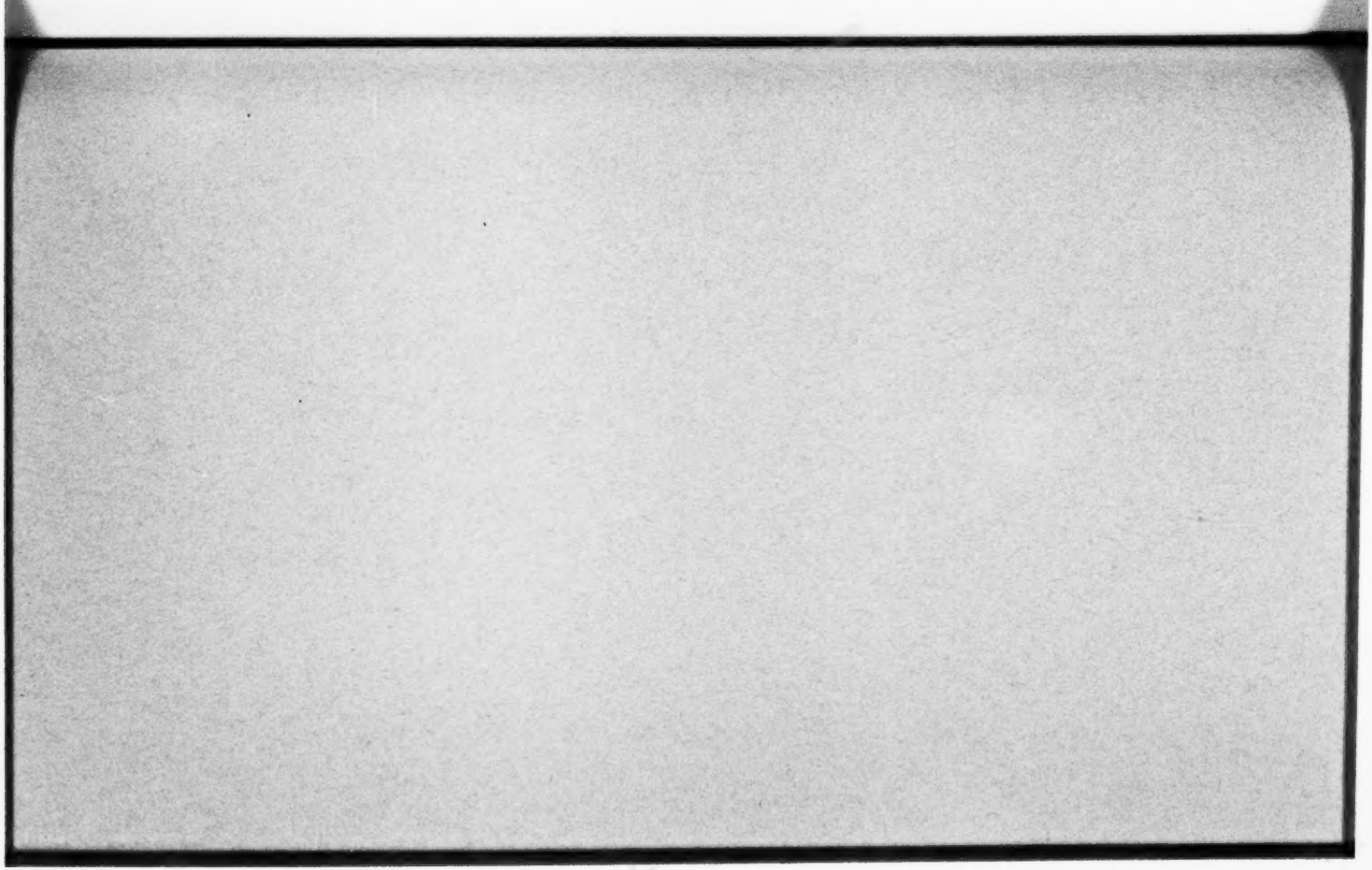

INDEX.

CITATIONS.

Cases:

Statute:

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A few of the points made in the brief in opposition, submitted on behalf of the United States, are such that comment may be of assistance in appraising the questions presented by the petition for issuance of the writ. Confining ourselves to those few points we submit this reply.

I.

As to the Constitutionality of the Statute.

Because of the fact that petitioner and certain of its affiliated companies are engaged in interstate commerce, counsel for the United States assert, in effect, that the ap-

plication of the prohibitions of section 12 (h) of the act to companies not engaged in such commerce is not pertinent to the constitutional questions here involved. They say that "it will be time enough to decide the constitutionality of such regulation when, if ever, it arises" (Brief, p. 15).

In that respect, we submit, their definition of the constitutional question is not maintainable in view of these factors:

> (1) Section 12 (h) is applicable, by its terms, to every registered holding company and to every subsidiary company thereof; and neither the definitions in section 2 (15 U. S. C., §79b) of the Act nor the provisions of section 4 (15 U. S. C., §79d), requiring registration as a condition of engaging in any of the activities there enumerated, confine the descriptive terms to those companies which actually engage in interstate commerce.
>
> (2) So far as concerns the class of companies to which the provisions of section 12 (h) are applicable there is no question of separability.

Therefore, the question presented is not limited by the evidence showing that petitioner is engaged in interstate commerce. Whether or not Congress might have imposed such prohibitions upon companies so engaged, it did not so limit the application of this statute. What is in question is the power of Congress to impose the comprehensive prohibition which this statute, by its terms, imposes, not the power to impose such prohibitions in the narrower field marked out by the evidence in this case.

> *James v. Bowman*, 190 U. S. 127;
> *United States v. Reese*, 92 U. S. 214.

The brief in opposition names several factors as indicating a relationship between contributions for political purposes and interstate commerce. The only one of these upon

which we need comment is that stated at page 17 of the brief, referring to an argument said to have been made by petitioner in the court below. Counsel are mistaken in the statement (at page 17 of the brief in opposition) that Union Electric Company argued below

> "that the political use of the company's money was favorable to the interests of consumers for the reason that bills disadvantageous to the company were defeated and bills advantageous to its interest were passed, resulting in a saving to the company of approximately two and one-half million dollars annually * * *."

No such argument was made on behalf of Union Electric Company in either of the courts below, nor was it ever asserted on behalf of the company that there had been such a saving, or any saving, to the company by reason of the political use of its money. Apparently counsel for the United States have been misled by the part of the opinion of the Circuit Court of Appeals wherein that Court stated that such an argument had been made. The Court of Appeals said "* * * it is argued"—and then recited the argument to the effect stated in the brief of counsel for the United States. It is true that such an argument was made, but on behalf of the Government, not on behalf of Union Electric Company.[1]

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[1] The statement by the Circuit Court of Appeals that Union Electric Company profited by the illegal expenditures to the extent of more than two and one-half million dollars annually (R. 1236) is based upon the testimony of the two officers of the company (not parties to this action) who had carried out the illegal scheme. One of them, Laun, was permitted to testify, over petitioner's objections that in 1937 he had computed the amount which the company would have lost had the Missouri Legislature passed, at its 1937 session, all of the bills which he had opposed, and that the figure at which he arrived was "somewhere between a million and a half and two million dolars a year" (R. 677-678, 679). The other former officer, Boehm, referring in his testimony to that computation by Laun, said that "it showed that the bills, if passed, would have added about two and a half million dollars a year to the expenses of Union Electric Company (R. 866).

II.

The Question as to the Test of Agency.

This is not the question, stated in the brief for the United States (p. 3), "whether petitioner * * * is liable for the acts of its officers in making political contributions in violation of 12 (h)." It is the question whether the court below applied a correct test of the agency essential to such liability.

The decision of the Court of Appeals upon this question is appropriate matter for review by this Court for several reasons. There are few Federal decisions in criminal cases in which the test of a corporation agent's authority has been defined. There are none, so far as our research discloses, involving the elements present in this case. Recently there has been an increase in the number of cases in which corporations are charged with crime. Definition by this Court of the test applicable to the evidence in this case would serve an important purpose.

Moreover, the opinion of the Circuit Court of Appeals in this case is based upon what is said to be the effect of this Court's decisions in *New York Central H. R. R. v. United States*, 212 U. S. 481. If the Circuit Court of Appeals has misinterpreted and misapplied the decisions in the case cited, as we think it has, its error in that respect should be corrected, especially in view of the fact that pertinent decisions upon the point are so few.

The test of the alleged agency of petitioner's officers who made the contributions in this case should have been formulated in view of these factors:

(1) That there was no evidence of express authorization to make political contributions and that the general authority of officers was only such as generally pertained to their offices (By-Laws, Art. III, §3—R. 930).

(2) That the powers and purposes of the corporation as defined in its charter (R. 229-233, 235-237)

did not include political activity of any sort and that political contributions were positively placed beyond the sphere of allowable corporation activity by the statutes of Missouri (R. S. Mo. 1939, §5346—R. S. Mo. 1929, §4941), wherein petitioner was incorporated.

Notwithstanding these facts, of course, the corporation could have so authorized the making of political contributions in its behalf as to subject it to legal responsibility. But no such authorization may be implied from the mere fact that the persons who made the contributions were its officers.

Yet the trial court, in the part of its charge quoted and approved by the Circuit Court of Appeals (R. 1247-1248), told the jury that petitioner should be found guilty if the contributions were made by named persons, acting "as officers" and "on behalf of, **or** for the benefit of" petitioner—and this, although such action was "not within the officers' or agents' corporate powers" (R. 1185-1186).

In the brief in opposition to the issuance of the writ (at pp. 20-21), as in the opinion of the Circuit Court of Appeals (R. 1250-51), the action of the officers in making the contributions is related to their authority to act for the corporation in opposing disadvantageous legislation, in cultivating its "public relations" and in protecting the company against excessive tax assessments. Because the contributions had or might have had advantageous effects in those fields, the Circuit Court of Appeals concluded that they were within the field of activity in which petitioner's officers were authorized to act for it.

The vice of that reasoning is that it leaves out of account the subject matter of the acts in question. Assuming that the motive of those who made the contributions was to cultivate friendly relationships which would be of advantage at a later time does not answer the vital question. The question is whether the subject matter of the act is one

with respect to which the officer has been authorized to represent the corporation. The subject matter of the act was the making of the contribution, and that subject matter was not included in the general authorization vested in the petitioner's officers. An officer of a corporation may not adopt any means he may choose to accomplish a benefit to a corporation. The subject matter of the act which he chooses as a means must itself be within the field of his authorized activity.

The question which we seek to have the Court pass upon is confined to the test of agency, as defined in the opinion of the Circuit Court of Appeals. The test adopted is inconsistent, we submit, with the decisions of this Court in the two cases cited in our petition (*New York Central & H. R. R. v. United States*, 212 U. S. 481, and *Washington Gas Light Co. v. Lansden*, 172 U. S. 534).

Conclusion.

For the reasons stated, both the constitutional question and the question as to the test of petitioner's responsibility for the unlawful acts involved are of such importance that the decision of the Circuit Court of Appeals upon them should be reviewed by this Court.

Respectfully submitted,

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